

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

AWP, INC., d/b/a AREA WIDE PROTECTIVE¹

Employer

and

JAMES A. WINTERS

Petitioner

Case 4–RD–2068

and

DISTRICT LODGE NO. 98, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO²

Intervenor

**REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

The Employer, Area Wide Protective, provides traffic control and flagging services, principally for public utilities, in 10 states including Pennsylvania. The Petitioner, James Winters, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Intervenor, Machinists District Lodge No. 98, as the representative of employees who work in the Employer’s York/Reading region in eastern Pennsylvania. The Intervenor contends that the petition is barred by its collective-bargaining agreement with the Employer, which expired on March 27, 2006. In this connection, the Intervenor contends that by its terms, the contract automatically renewed upon its expiration, and/or the contract was extended by agreement of the parties. The Petitioner and the Employer assert that the petition was timely filed and that there is no contract bar to an election.

A Hearing Officer of the Board held a hearing, and the Intervenor filed a brief. After considering the evidence and the arguments presented by the parties, I have concluded that there is no bar to an election. Accordingly, I have directed an election in the petitioned-for unit.

¹ The Employer’s name appears as amended at the hearing.

² The Intervenor’s name appears as amended at the hearing.

In this Decision, I will review the relevant law governing contract bars. Then, I will present the facts and reasoning that support my conclusion.

I. RELEVANT LAW

The purpose of the Board's contract bar rules is to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958); see also *Deluxe Metal Furniture Co.*, 121 NLRB 995, 997 (1958). Pursuant to these rules, a contract for a reasonable term not in excess of three years will bar a representation petition for the duration of the agreement except for an "open period" from 60 through 90 days before the termination date of the agreement, during which a representation petition may be filed. *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958, 959–960 (1982); *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). To constitute a bar, a contract must be in writing, signed by all parties prior to the filing of a petition, and contain substantial terms and conditions of employment. *Appalachian Shale Products*, above at 1162-1163; see also *Television Station WVTM*, 250 NLRB 198, 199 (1980). The burden of proving that a contract is a bar falls on the party asserting that it has that effect. See *Road and Rail Services, Inc.*, 344 NLRB No. 43, slip op. at 2 (2005); *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

The Board has long held that an automatically renewed agreement bars an election petition filed during the renewal period. *ALJUD Licensed Home Care Services*, 345 NLRB No. 88 (2005); *Deluxe Metal Furniture Co.*, above. However, absent express language to the contrary, requests to negotiate changes to the contract received by the other party prior to the automatic renewal date will ordinarily prevent its renewal for contract bar purposes. *Bridgestone/Firestone, Inc.*, 331 NLRB 205 (2000). Compare *KCW Furniture Co.*, 247 NLRB 541 (1980), *enfd.* 634 F.2d 436 (9th Cir. 1980).

A contract that has no fixed term does not bar an election for any period. *McLean County Roofing*, 290 NLRB 685, 686 fn. 5 (1988); *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990, 993-994 (1958). Contracts with no fixed term include contracts of indefinite duration, *W. Horace Williams Co.*, 130 NLRB 223, 224 (1961), contracts terminable at will, *Pacific Motor Trucking Co.*, 132 NLRB 950, 951 (1961), temporary agreements to be effective pending a final agreement, *Bridgeport Brass Co., Aluminum Div.*, 110 NLRB 997, 998 (1955), and extensions of expired agreements pending negotiations, *Frye & Smith, Ltd.*, 151 NLRB 49, 50 (1965); *Union Bag and Paper Corp.*, 110 NLRB 1631, 1633-1634 (1954).

II. FACTS

The Employer employs approximately 80 flagger employees and crew chiefs under the parties' collective-bargaining agreement, which by its terms was effective from March 27, 2004

through March 27, 2006. Article XXV of the contract, entitled “Duration,” provides in relevant part:³

[A]t the two-year expiration date, this Agreement shall be renewed automatically for periods [sic] of one (1) year unless either party gives written notice of a desire to modify, amend or terminate it at least sixty (60) days, but not more than ninety (90) days prior to the expiration date.

Article XXIV, the “Savings Clause/Merger Clause,” states, among other things:

This Agreement, along with any side letters affixed hereto, is the entire agreement between the parties. Any prior writings, agreements or promises are deemed incorporated herein.

By letter dated January 11, 2006⁴ from the Intervenor’s Assistant Directing Business Representative, Pete Mathieu, to Employer President Bill Fink, the Intervenor stated:

[N]otification is given that the under-signed hereby intends to modify the Agreement presently existing between your Company and Lodge 2367 of District 98, International Association of Machinists and Aerospace Workers, AFL-CIO, effective March 26, 2006.

This notice is served as required by Article XXV of the present Agreement. The modifications we propose will be presented at a later date.

Thereafter, the parties held two negotiation sessions, on February 22 and March 16. At these meetings, the Intervenor proposed modifications to the contract, and the parties reached tentative agreement on some items.

At the March 16 meeting, the parties verbally agreed to extend the expiring contract until they reached agreement on a successor contract. This agreement was memorialized in a letter from the Employer to the Intervenor dated March 17, which the Intervenor signed on March 22. More specifically, the March 17 letter acknowledged that the parties had not yet reached an agreement on all contract terms. The letter further stated:

AWP has agreed to continue in effect the terms and conditions of the expired collective-bargaining agreement subsequent to March

³ Article XXV also states that that the parties will reopen and bargain over economic issues after the first year of the contract if the Employer enters into a new contract with First Energy, which presumably is a major customer.

⁴ All dates are in 2006 unless otherwise indicated.

27, 2006. The Union has agreed to abide by said terms and conditions until such time as either party gives the other a minimum of ten (10) days' written notice of its intention to cease working under or applying said terms and conditions.⁵

Since March 16, the parties have not met to bargain or scheduled any further bargaining sessions. The petition in this case was filed on March 29.

III. ANALYSIS

The Intervenor contends that the contract was automatically renewed pursuant to Article XXV and that the petition is therefore barred. This contention is without merit. The cited provision indicates that the agreement will not automatically renew if a party gives timely notice of a desire to modify, amend, or terminate it, and the Intervenor's January 11 letter clearly expressed an intent to modify the existing agreement; indeed, the parties thereafter engaged in negotiation sessions where the Intervenor sought contract modifications. The Intervenor's letter thus forestalled the operation of automatic renewal under the plain language of Article XXV, and the automatic renewal language cannot be used to support a contract bar. *Bridgestone/Firestone*, above; *Deluxe Metal Furniture, Inc.*, above.

The Intervenor also asserts that the parties' agreement to extend the contractual terms and conditions beyond the March 27 expiration date, as reflected in the Employer's March 17 letter, serves to bar the petition. This contention, however, is not supported by the record. Rather, at the time that the parties agreed to this contract extension, they had begun negotiations for a new contract but had not reached agreement on the terms of a final agreement. The March 17 letter stated that the parties would continue to maintain the terms and conditions of employment contained in the prior agreement only until they reached a new agreement or either party gave at least 10 days' notice to cease operating under that agreement. The letter did not include any expiration date for the extension of the contractual terms and conditions. Thus, that agreement was a "stop-gap agreement" of indefinite duration that was intended to maintain the terms of the expired contract until the parties reached agreement on a new contract, and as such, it cannot operate as a bar to the petition. See *Frye & Smith Ltd.*, above; *Pacific Coast Assn. of Pulp and Paper Mfrs.*, above.⁶

⁵ The letter further indicated that upon ratification of the successor agreement, any improvement in compensation would be made retroactive to March 28, 2006.

⁶ The Intervenor contends that pursuant to Art. XXIV, the Savings Clause/Merger Clause, the March 17 letter was incorporated into the expiring collective-bargaining agreement. That provision, however, clearly referred to side letters that had been executed at the time the contract went into effect, not to subsequent letters. Moreover, regardless of whether these letters became part of the contract, they did not set forth any definite term; rather, any extension of the contract was of indefinite duration.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.⁷
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Intervenor claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:⁸

All full-time and regular part-time hourly flagger employees, including crew chiefs, employed by the Employer in its Eastern Pennsylvania or York/Reading region, **excluding** all office clerical employees, guards, and supervisors as defined by the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

⁷ The Intervenor has asserted that the Hearing Officer was hostile to the Intervenor and improperly favored the Petitioner and the Employer at the hearing. I have carefully reviewed the record, and I find that the Intervenor's assertions are wholly without merit and that the Hearing Officer conducted the hearing in an unbiased manner consistent with her responsibility to ensure a clear and complete record.

⁸ The parties stipulated that this unit is appropriate.

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the **full** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **May 8, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658, or by e-mail to Region4@NLRB.gov.⁹ Since the list will be made available to all parties to the election, please furnish a total of three (3) copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

⁹ See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Region's electronic mailbox. OM 05-30 is available on the Agency's web site at www.nlr.gov.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three **(3)** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five **(5)** working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see <http://gpea.NLRB.gov/>. This request must be received by the Board in Washington by 5:00 p.m., EDT on **May 15, 2006**.

Signed: May 1, 2006

at Philadelphia, Pennsylvania

/s/ [Dorothy L. Moore-Duncan]

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four